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In the

SUPREME COURT OF THE UNITED STATES

RAYMOND L. NEAL, AVIATION ELECTRONICS TECHNICIAN AIRMAN, UNITED STATES NAVY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Armed Forces

REPLY BRIEF FOR PETITIONER

DILLON J. AMBROSE
Lieutenant,
JAGC, USN
Counsel of Record
1254 Charles Morris SE
Bldg 58, Suite 100
Washington, D.C. 20374
(202) 354-3562

KIRK SRIPINYO
Major,
USMC
Counsel
1254 Charles Morris SE
Bldg 58, Suite100
Washington, D.C. 20374
(202) 685-5398

632

TABLE OF CONTENTS

REPLY BRIEF FOR PETITIONER 1

CONCLUSION 12

TABLE OF AUTHORITIES

Cases **Page**

Humanik v. Beyer, 871 F.2d 432 (3d Cir. 1989) 2, 3, 4
Lawrence v. Texas, 539 U.S. 558 (2003) 7
Martin v. Ohio, 480 U.S. 228 (1987) ..... *passim*
Middendorf v. Henry, 425 U.S. 25 (1976) 11
Parker v. Levy, 417 U.S. 733 (2003) 11
Russell v. United States, 698 A.2d 1007 (D.C. 1997) 1
State v. Camara, 781 P.2d 483 (Wash. 1989) 1
United States v. Martin, 528 F.3d 746 (10th Cir. 2008) 8
United States v. Rivera, 43 F.3d 1291 (9th Cir. 1995) 8
Weiss v. United States, 510 U.S. 163 (1994) 10

Constitution, statutes, and legislation

U.S. Const., Amend. V (Due Process Clause) 5
10 U.S.C. § 920 ..... 1, 5, 6, 8
18 U.S.C. §§ 2241-2247 8
D.C. Code §§ 22-3007 (2010) 9
D.C. Law 18-88 (Dec. 10, 2009) 9

D.C. Report on Bill 18-151: Committee on Public Safety and the Judiciary, "Omnibus Public Safety and Justice Amendment Act of 2009" 9
Sexual Abuse Act of 1986, Pub. L. No. 99-646, § 87, 100 Stat. 3620 8

Other Authorities

Merriam-Webster's Collegiate Dictionary (10th ed. 2001) 7
The New Oxford American Dictionary (2d. ed. 2005) 6, 7

REPLY BRIEF

Martin v. Ohio prohibits "shift[ing] to the defendant the burden of disproving any element of the state's case."[1] The instant statute, 10 U.S.C. § 920, does exactly that. Review is necessary not only to rule on this unconstitutional burden allocation, but to counter the misinterpretation of *Martin* that has been applied by several courts, and that has been endorsed by the government in its opposition.

1. The government charges Petitioner with an "unduly narrow reading of *Martin*."[2] It reads *Martin* to permit *any* overlap between an element of a crime and an affirmative defense, including negating it, as long as a jury is instructed that the government must still meet its burden on the common element.

The government's position aligns itself with the view of the court below, as well as the courts in *State v. Camara*[3] and *Russell v. United States*.[4] The court below and the D.C. Court of Appeals in *Russell* affirmed the statutory burden allocation at issue without addressing the due process limits of "overlap" constituting a negation of an element. The Washington Supreme Court, however, in *Camara* directly addressed this issue. It held that "[f]ollowing *Martin*, it appears that assignment of the burden of proof on a defense to the defendant is not precluded by the fact that the defense 'negates' an element of a crime."[5] The government now

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[1] 480 U.S. 228, 234 (1987).

[2] Opp'n. at 13.

[3] 781 P.2d 483 (Wash. 1989).

[4] 698 A.2d 1007 (D.C. 1997).

[5] *Camara*, 781 P.2d at 487.

argues the same, that an affirmative defense negating an element does not constitute an impermissible burden shift:

> [e]ven if '*most* encounters in which [consent] is claimed' by a defendant involve evidence that 'negate[s]' the government's proof of the element of force, the defendant's option of pursuing that affirmative defense 'does not shift to the defendant the burden of disproving any element of the [government's] case'.[6]

Under its reading of *Martin*, the government can be burdened with proof of element "x" and the defense can be burdened with proof of affirmative defense "not x," without due process concerns.

Review is necessary to correct this continued misinterpretation of this Court's precedent. *Martin*, while allowing a degree of overlap between proof of an element and proof of an affirmative defense, prohibits "shift[ing] to the defendant the burden of disproving any element of the state's case."[7] Whenever the defense is saddled with a burden of persuasion on an affirmative defense, and that affirmative defense will serve to negate an element of the government's case, the defendant has been burdened with disproving an element of the government's case. If the prosecution must prove "x," and the defense must prove "not x," then the defense must disprove "x."

The court in *Humanik v. Beyer*,[8] in analyzing a

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[6] Opp'n. at 12 (emphasis in original).

[7] 480 U.S. at 234.

[8] 871 F.2d 432 (3d Cir. 1989).

New Jersey statute that involved a burden allocation, outlined the permissible limits of due process in this field of burden allocation. The *Humanik* court noted the distinction between cases in which "the ultimate issues posed by one of the elements of the offense and by an 'affirmative defense' are different, but nevertheless are such that subsidiary facts are relevant to both issues" and cases in which "the element of the offense and the so-called 'affirmative defense' pose the same ultimate issue and a state places the burden of persuasion on the defendant with respect to that ultimate issue."[9] According to the *Humanik* court, the former cases are constitutional, as long as the jury is instructed that the evidence may be used to attack the element of the crime, regardless of whether the affirmative defense burden is met.[10] The latter are unconstitutional, as "the relevance of the subsidiary facts in th[ose] case[s] are the same and the sole significance of the defendants' evidence concerning the so-called 'affirmative defense' is to create a reasonable doubt about the existence of an element of the offense."[11]

This is precisely the distinction missed by the government and the courts that interpret *Martin* broadly. If the government is correct, this broad interpretation would render the affirmative defense useless, such that it could *never* be reached. If evidence of "not x" exists at a level meeting the greater quantum of evidence, a preponderance of the evidence (affirmative defense burden), it will

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[9] *Id.* at 440.

[10] *Id.*

[11] *Id.*

necessarily meet the lower quantum of evidence, reasonable doubt in "x," as that evidence pertains to the same issue. Reasonable doubt reached, this would eliminate the need to reach a decision on the affirmative defense. This means that the proof of the affirmative defense of "not x" will serve entirely to disprove the element of "x," and thus the "sole significance of the defendants' evidence concerning the so-called 'affirmative defense' [would be] to create a reasonable doubt about the existence of an element of the offense."[12]

And in spite of what the government suggests is possible from its broad reading of *Martin*, jury instructions cannot eliminate the contradiction of dual burdens on the same issue. If a jury is instructed that (1) the government must prove "x" beyond a reasonable doubt; and (2) that the defense must prove "not x," by a preponderance of the evidence, there exists a "danger that the jurors will resolve the inconsistency in a way that lessens the presumption of innocence."[13]

Lastly, this contradiction in burdens improperly credits the government's proof of element "x." If the defense must establish "not x" by a preponderance of the evidence, the default position is that "not x" is less likely than not, which also means element "x" is credited as being more likely than not. As a result, the government is given default credibility as to element "x," without proving a thing. The defense is thus left to attack this presumption of existence of "x," *i.e.* prove "not x" in order to disprove element "x."

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[12] *Id.*

[13] *Martin*, 480 U.S. at 238 (Powell, J., dissenting).

This presumption violates the requirement of *Martin* by statutory imprimatur, anointing element "x" as already meeting a preponderance of the evidence, and forcing the defense to battle that presumption.

Review is necessary in this case because the appropriate contours of *Martin* must be clarified, lest legislatures and courts remain ignorant of the outer limits of due process in the area of burden allocation.

2. Because the Due Process Clause of the Constitution requires, as stated within *Martin*, that a defendant shall never be required to disprove an element of the government's case, the new statutory scheme set forth in 10 U.S.C. § 920 violates this constitutional imperative by burdening the defense with proving consent, which directly negates the government's element of force. Because force is defined by reference to a lack of consent, the two concepts cannot be divorced. Therefore, proof of consent wholly, necessarily, and unconstitutionally negates an element of the government's case.

Apart from the government's reading of *Martin*, which would legitimize *any* overlap between proof of an affirmative defense and proof of an element, the government nevertheless argues that while "consent is often relevant in determining whether 'force' has been established beyond a reasonable doubt, it is not invariably so."[14] As proof, the government sets forth an example of a scenario in which it claims consent would not negate the element of force:

> [A] defendant uses "force" if he takes action to "prevent another's resistance" with physical strength "applied to

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[14] Opp'n. at 11—12.

> another person" such that "the other person could not avoid or escape the sexual conduct."[15]

The government states that the defendant could be found guilty of aggravated sexual contact, "even where the nominal victim enjoyed the defendant's use of force and affirmatively consented to the contact."[16] This is not so, as this example ignores the pertinent definitions within that example, and the context of those words within the statute.

First, the words within the example itself indicate lack of consent. "Resistance" is defined as "the refusal to accept or comply with something."[17] "Avoid" is defined as to "keep away from or prevent oneself from doing (something)."[18] "Escape" is defined as "an act of breaking free from confinement or control" or "an act of successfully avoiding something dangerous, unpleasant, or unwelcome."[19] All of these terms speak to non-consensual concepts. Resistance is prevented only when a person expects actual opposition, and takes action to ensure that opposition cannot occur. One simply does not resist, avoid, or escape that which one wants.

Second, the rest of the definition of force need be examined under the principle of *noscitur a sociis*. Action to prevent resistance should be viewed through the same prism as the other two forms of force under 10 U.S.C. § 920(t)(5), *i.e.* action to compel submission and action to overcome resistance. To

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[15] Opp'n. at 12.

[16] *Id.*

[17] The New Oxford American Dictionary 1441 (2d. ed. 2005).

[18] *Id.* at 110.

[19] *Id.* at 574.

"compel" is "to force or oblige someone to do something" or "bring about (something) by the use of force or pressure."[20] It has also been defined as "to drive or urge forcefully or irresistibly."[21] To "submit" is "to accept or yield to a superior force or to the authority or will of another person."[22] To "overcome" is "to defeat (an opponent); prevail; overpower or overwhelm."[23] These terms also speak to non-consent, to irresistibly urge one to yield to that person's authority, or to defeat a refusal to comply. To prevent resistance involves the same theory, and should be given its contextual reading, that is, an action to impede the refusal to comply with a sexual act—to prevent opposition. Because both the definition of the words within the government's example and the context surrounding that language do not inure to a reading involving consent, the government's example should be discarded. There simply is no working example where consent and force can co-exist.[24]

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[20] *Id.* at 346.

[21] *Merriam-Webster's Collegiate Dictionary* 234 (10th ed. 2001).

[22] The New Oxford American Dictionary 1686.

[23] *Id.* at 1212.

[24] Additionally, the government's example would seemingly make criminal a private consensual act between two parties, making this statute overly broad, and violating the personal privacy interests recognized by this Court in *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (holding that the Due Process Clause provides a liberty right to conduct private, consensual sexual activity between two mutually consenting adults, thereby shielding such acts from criminality.) While Petitioner's reading of the statute may also violate the Constitution, Petitioner's is a more reasonable reading, as it at least assumes what has traditionally been considered

The government notes that Congress substantially changed 10 U.S.C. § 920 to "align[] the statutory language of sexual assault law under the UCMJ with federal law under sections 2241 through 2247 of title 18, United States Code."[25] The government also correctly notes that the Sexual Abuse Act of 1986 made changes to the United States Code's sexual assault statute by removing lack of consent as an element of the offense.[26] The government does not note, however, that under federal case law, consent will negate the element of force.[27] The same is true under 10 U.S.C. § 920, because force is defined in terms of consent. The crucial difference is that under 10 U.S.C. § 920, the defense has a burden on this component, something that not only surpasses the federal statute, but every other sexual assault statute within the United States.[28]

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criminal—an act done against another's wishes—rather than what has always been considered, and is currently considered a legal sexual act in every other jurisdiction of the United States.

[25] Opp'n at 3.

[26] *Id.*

[27] *See United States v. Rivera*, 43 F.3d 1291, 1298 (9th Cir. 1995) (affirming district court instruction "to find Rivera guilty only if they concluded he used force or threats to engage in intercourse with Natasha. If he did not (i.e., Natasha consented), they were to find him not guilty"); *United States v. Martin*, 528 F.3d 746, 753 (10th Cir. 2008) (finding that "requiring the jury to find that the defendant 'caused [the victim] to engage in a sexual act . . . by using force . . . or by threatening . . . death or serious bodily injury' . . . adequately covered the issue of lack of consent").

[28] While the District of Columbia appears to be the only jurisdiction to have enacted a comparable statute, that portion of the law requiring the defendant to prove the affirmative

While the government argues this revision "defined that offense to turn on the force employed by the accused, not the victim's mental state or conduct,"[29] this statement neither squares with the lower court's recognition that "the statute describes the degree of force in terms of the relative actions of the accused and the alleged victim,"[30] nor the government's next sentence: "And although consent is often relevant in determining whether 'force' has been established beyond a reasonable doubt, it is not invariably so." Consent is relevant only because the statute defines "force" relative to it.

Consent will always raise a reasonable doubt about the element of "force," as defined within this statute. And because consent will always negate force, due process protections prevent this statutory scheme. Review is necessary to overturn this unconstitutional burden allocation, which threatens to decrease the government's burden on the element of "force," and require the defense to disprove an element of the government's case.

3. Neither the interlocutory nature of this case,

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defense of consent by a preponderance of the evidence was recently removed from the statute in December 2009. *See* D.C. Code § 22-3007 (amended by D.C. Law 18-88 (Dec. 10, 2009)). Legislative history indicates that the unconstitutionality of burdening the defense with proof of consent was considered in removing that burden from the statute. *See* Committee on Public Safety and the Judiciary, Report on Bill 18-151, "Omnibus Public Safety and Justice Amendment Act of 2009," (June 26, 2009) at 18, available at: http://www.dccouncil.washington.dc.us/images/00001/20090827154724.pdf.

[29] Opp'n. at 11.

[30] Pet'r's. App. 33a.

nor the military justice context of this statute weigh against review of this important issue.

a. While this case is before the Court in an interlocutory posture, all the facts and law are present to fully adjudicate the issues within this petition. Contrary to the government's assertion, this case was not "mid-trial," but at the pregnant point at which instructions would have been required. The whole of the evidence was, and is, available for review. Finding no viable instructions that could remedy this impermissible burden allocation, the military judge dismissed the case. Review of an interlocutory appeal is actually ideal under these circumstances, as it provides the Court with the fastest, most efficient way to determine the viability of this statute, without needless convictions or unjust acquittals based upon the confusion inherent in this statute.

b. A due process violation will be found, within this military context, where the "factors militating in favor of" not having this burden allocation "are so extraordinarily weighty as to overcome the balance struck by Congress."[31] Unlike the example provided by the government, *Weiss v. United States*, the due process violation here does not deal with the rather innocuous right to have military judges with fixed terms of offices, but rather, with the weighty due process question of whether military members should be burdened with disproving an element of the government's case, and potentially be convicted on proof less than a reasonable doubt. These being core due process protections, this issue satisfies the

[31] *Weiss v. United States*, 510 U.S. 163, 177—78 (1994).

"extraordinarily weighty" test to examine whether Congress has overstepped its legislative authority.

The government is correct that Congress "possesses broad authority to define military offenses that would not constitute crimes in the civilian world,"[32] but this is not such a crime. *Parker v. Levy*, which the government cites, dealt with specific military crimes with broad, unspecified reach, such as conduct unbecoming an officer. The instant criminal statute *does* constitute a crime in the civilian world, and there is no military necessity to change the formulation of a standard criminal statute. Furthermore, the government's reliance on the lower court's *post hoc* rationalization of the need to change this statute because of military necessity is misplaced. First, we look to Congress, not the lower court for this rationale. Second, while the government cites *Middendorf v. Henry*[33] for the proposition that "courts of military appeals' 'judgments are normally entitled to great deference,'"[34] they are only to be given deference when "[d]ealing with areas of law peculiar to the military branches,"[35] which this most assuredly is not.[36] Sexual assault is as common as a crime gets, therefore this statute does not merit special deference to the military courts below.

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[32] Opp'n at 10 n.7 (citing *Parker v. Levy*, 417 U.S. 733, 749 (1974)).

[33] 425 U.S. 25 (1976).

[34] Opp'n. at 10 n.7 (citing *Middendorf*, 425 U.S. at 43).

[35] *Middendorf*, 425 U.S. at 43.

[36] *Middendorf* also notes that even less deference should be afforded when the military appellate panel is divided, such as the 3-2 split found in the instant case. *See id.* at 43.

CONCLUSION

If *Martin* is clear, as Petitioner suggests, and an overlap is prohibited when it involves negation of an element, review is appropriate to overturn this statute. Review would also reaffirm the proper limits of *Martin,* so that the trend toward misapplication of that precedent is reversed, and legislatures are on clear notice of the due process limitations in allocating burdens onto a defendant.

For the foregoing reasons and those stated in the petition, this petition for writ of certiorari should be granted.

Respectfully submitted,

DILLON J. AMBROSE
Lieutenant, JAGC, USN
Counsel of Record

KIRK SRIPINYO
Major, USMC
Counsel